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No. 95-974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ARIZONANS FOR OFFICIAL ENGLISH
and ROBERT D. PARK,

Petitioners,

v.

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ;
JAIME GUTIERREZ; and ARIZONANS AGAINST
CONSTITUTIONAL TAMPERING,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, THE CLAREMONT INSTITUTE FOR THE STUDY OF STATESMANSHIP AND POLITICAL PHILOSOPHY, 34 MEMBERS OF CONGRESS, AND THE STATE OF NEBRASKA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with supporters in all fifty states. WLF participates in litigation and administrative proceedings affecting the broad public interest, and has a particular interest in opposing intrusions by the federal government into decisions about the operations of state governments, where those decisions are properly reserved to the states' citizens. In that regard, WLF has participated as a party or *amicus curiae* in numerous cases before this Court, as well as other courts across the country. For example, in *Wilson v. Voting Rights Coalition*, No. 95-673, WLF filed a brief supporting California in its litigation over the constitutionality of the unfunded mandates in the National Voter Registration Act of 1993, 42 U.S.C.A. § 1973gg-1 *et seq.* WLF also filed a brief before the lower court, sitting *en banc*, in the present litigation, as well as a brief on the petition for writ of certiorari before this Court.

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a nonprofit educational and research institution founded in 1979 and based in Claremont, California. The Claremont Institute seeks a return of America's founding principles to their rightful preeminence in our public life. It agrees with our Founding Fathers that the citizenry's adherence to America's central principles, coupled with an enlightened public discourse, is essential to successful republican government. The Claremont Institute believes that both are threatened by the fragmentation inherent in multiculturalism and multilingualism, and that Official English provisions help preserve the language of our political and legal traditions as the common tongue of all Americans, regardless of their heritage.

United States Representatives Charles T. Canady, Toby Roth, Henry J. Hyde, Bob Livingston, Bill Baker, Bob Barr, Bill Barrett, Doug Bereuter, Brian Bilbray, Thomas J. Bliley, Jr., Peter Blute, Sonny Bono, Ed Bryant, Jon Christensen, Wes Cooley, Philip M. Crane, Frank Cremeans, John T. Doolittle, Robert K. Dornan, Bob Goodlatte, Mel Hancock, Doc Hastings, Martin Hoke, Bob Inglis, Sue Kelly, Peter King, Joe Knollenberg, William Lipinski, Jan Meyers, Dana Rohrabacher, Ed Royce, Matt Salmon, Jim Sensenbrenner, Jr., and Charles H. Taylor are Members of Congress who oppose the ruling of the court below and who believe it should be reversed. These members are concerned by the decision's potential implications with respect to any future legislation on "Official English" by the states and by Congress. They are also concerned by the implications for government operations generally of the holding that public employees have a presumptive right under the First Amendment to determine how and whether to comply with official directives concerning "expressive" job functions.

Rep. Charles T. Canady is chairman of the Subcommittee on the Constitution of the House Judiciary Committee.

Rep. Toby Roth is the sponsor of H.R. 739, the Declaration of Official English Act, a bill to declare English as the official language of the United States Government. Many of the Members joining this brief are among the 94 current co-sponsors of H.R. 739.

Rep. Henry J. Hyde is chairman of the House Judiciary Committee.

Rep. Bob Livingston is chairman of the House Appropriations Committee.

The State of Nebraska, like the State of Arizona, has a provision in its state constitution declaring English to be the official language of the state. Neb. Const. art. I, § 27. The State of Nebraska is concerned about the implications of the decision below for the validity of its own state constitutional provision and any legislation or regulations adopted pursuant to it.

Amici believe that government policy, particularly in a diverse society such as ours, should promote the use of a common language. *Amici* further believe that it is desirable and constitutionally permissible for voters to determine that their government must act in that common language in most circumstances as a means of increasing government efficiency and furthering civic and social unity.

All parties have consented to the participation of the *amici*. Consent letters from counsel have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

This is not a case in which the government has attempted to regulate the choice of language or other speech of private individuals.[1] Nor is this a case in which the government has attempted to limit the rights that government employees "otherwise enjoy as citizens to comment on matters of public interest," whether inside or

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[1] *Cf. Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down prohibition on foreign language instruction in parochial school).

outside of the workplace.[2] To the contrary, in this case the people have attempted to regulate only the language that the *government* speaks. The First Amendment simply does not apply in this context: neither government employees nor individual private citizens have a constitutional right to insist that the government use a particular language. Congress, for example, has reserved the right to decide if and when to use languages other than English, and from the earliest days of the Republic rejected proposals to translate its laws for the benefits of citizens not proficient in English.

In striking down Article XXVIII of the Arizona Constitution, the Ninth Circuit disregarded the compelling interests that justify Official English provisions. Like any employer, the government is entitled to specify the language of its own messages, as well as the language of the workplace generally, in order to ensure that its messages--its laws, regulations, policies, and judicial opinions--are uniformly and accurately conveyed, and that its employees are properly supervised. Moreover, the very diversity of the American work force may require English-only rules on the job as a palliative for the fear and distrust that use of other languages may foster.

Finally, Official English provisions further the interests not only of the government, but also of the public in general and those not yet proficient in English in particular. Healthy political life requires popular deliberation in a common tongue. The English language is

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[2] *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *see also United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1012 (1995) (rules as to government employees' "expressive activities in their capacity as citizens, not as Government employees").

not merely one appropriate vehicle for deliberation: it is the *most* appropriate vehicle, because it is the language of America's philosophical, political, and legal traditions, and conveys best the essence of the American way of popular self-government. By providing incentives to learn English, Arizona's constitutional provision also helps integrate those who now speak only other languages into the broader society and economy. The decision of the Arizona voters to add Article XXVIII to the state constitution deserves the utmost respect, and the decision below invalidating that amendment should be reversed.

ARGUMENT

I. Official Acts of Government Constitute the Speech of the Government, Not the Protected Speech of Public Employees.

A. Article XXVIII Does Not Violate the Rights of Government Employees.

The government, like corporations and other legal persons, operates only through human agency. For a state to speak, its words must be communicated by people, whether orally or in writing. When a public employee speaks in an official capacity, the employee is speaking the words of the government.[3] As this Court stated only last Term, "when the State is the speaker, it may make content-based choices." *Rosenberger v. Rector & Visitors of Univ.*

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[3] *See Youker v. Schoenenberger*, 22 F.3d 163, 166-67 (7th Cir. 1994) (contents of employee's letter sent in official capacity on township stationery over supervisor's signature was not employee's personal protected speech "as a citizen") (citing *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

of Va., 115 S. Ct. 2510, 2518-19 (1995). The Court reaffirmed that "we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Id.* (citing *Rust v. Sullivan*, 500 U.S. 173, 196-98 (1991)). If the government may regulate the content of its message when it is conveyed by "private entities," then *a fortiori* it may do so when its message is conveyed by its own personnel.

In adopting Article XXVIII, Arizona voters have done no more than regulate how their government speaks. By its terms, Article XXVIII applies only to official government functions. Subject to certain exceptions, it provides that "[t]his State and all political subdivisions of this State shall act in English and no other language," and that "[n]o governmental document shall be valid, effective or enforceable unless it is in the English language." Ariz. Const. art. XXVIII, § 3(1)(a), (c).[4] This applies to "all statutes, ordinances, rules, orders, programs and policies" of the State or its subdivisions or agencies. The amendment applies to government officials and employees only "during the performance of government business." *Id.* Since the only words that must be English are those of government agents when they are speaking for the government, government employees' First Amendment rights in their personal speech are in no way affected.[5]

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[4] One such exception is where use of other languages is necessary to comply with federal law. *Id.* § 3(2). The latter clause belies any assertion that Article XVIII violates the Civil Rights Act, the Voting Rights Act, or other federal statutes.

[5] *See Rust*, 500 U.S. at 198-99 ("The employees' freedom of (continued...)

In an effort to find some excuse for invalidating the entire initiative, some of the intervenors and Ninth Circuit judges have seized upon a minor wrinkle: they argue that Article XXVIII violates the rights of elected officials to communicate with their constituents in other languages. As elected government officials, the *amici* Members of Congress are sensitive to the need to communicate freely with constitutents. However, such concerns are groundless. From the face of Article XXVIII, the amendment's thrust is the regulation of official state publications and civil servants, not elected officials. Moreover, Article XXVIII is easily construed so as to avoid any impact on the personal political activities of elected officials.

Article XXVIII reflects a functional approach: it does not apply to all communications by individual elected officials, but rather applies to "the legislative, executive, and judicial branches of government" and to government officials only during the performance of their government business. Just as "Congressional 'business' . . . does not include every act performed by a member of Congress,"[6] Arizona's "government business" does not include every act of an elected official.

The "government business" of a legislator, for example, is only his or her legislative function. Both this Court and Arizona law distinguish between "legislative

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[5](...continued)
expression is limited during the time that they actually work on the project," but not when they are "acting as private individuals").

[6] Laurence H. Tribe, *American Constitutional Law* 370-71 (2d ed. 1988).

acts" and related "political matters." *United States v. Brewster*, 408 U.S. 501, 512 (1972); *see also* Restatement (Second) of Torts § 590 cmt. a (1977), *adopted in Sanchez v. Coxon*, 854 P.2d 126, 130 (Ariz. 1993). Legislative acts include actions that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606, 625 (1972). This includes "conduct on the floor of the legislative body," as well as "the work of legislative committees or sub-committees that are engaged in an investigation or other work authorized by the legislative body, whether the work is performed while that body is in session or during a recess." Restatement § 590 cmt. a. Under Article XXVIII, such legislative functions must be performed in English.

By contrast, "government business" does not include an individual legislator's related activities that "are political in nature rather than legislative," including "legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assisting in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress." *Brewster*, 408 U.S. at 512.[7] That such

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[7] *See also United States v. Helstoski*, 442 U.S. 477, 489 (1979) ("Promises by a Member to perform an act in the future are not legislative acts."); *Hutchinson v. Proxmire*, 443 U.S. 111, 130-33 (1979) (newsletters and press releases are "not a part of the legislative function"); Restatement § 590 cmt. a (legislative function does not include "activities incidentally related to legislative affairs but not part

(continued...)

conduct is outside of government business is demonstrated by the fact that private citizens--including political challengers--may engage in the same conduct.[8]

To the extent that Article XXVIII regulates the language used in legislative debates, it is not a unconstitutional limitation on the content of individual legislators' speech or their ability to comment on matters of public concern. Rather, it is a regulation of the mode or manner of speech required to allow the legislature to achieve its purpose. This Court has recognized that the government may regulate the speech of its personnel as required to facilitate its operations. *See Waters v. Churchill*, 114 S. Ct. 1878, 1886-88 (1994). The essence of the legislative function is deliberation; legislators cannot deliberate if they cannot understand each other. Indeed, under an Arizona constitutional provision mandated by Congress as a prerequisite to admission to the Union, "[t]he ability to read, write, speak, and understand the English language sufficiently well to conduct the duties of the office without the aid of an interpreter shall be a

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[7](...continued)
of the legislative process itself").

[8] Thus, *Bond v. Floyd*, 385 U.S. 116 (1966), is distinguishable because that case involved the exclusion of a duly elected state legislator from membership in the legislature based on his statements on the Vietnam War and the draft, which were made outside of the legislature during a telephone interview with a local radio reporter. *Id.* at 122-23. Such statements would not be subject to Article XXVIII.

necessary qualification for all State officers and members of the State Legislature." Ariz. Const. art. XX, § 8.[9]

Similarly, to the extent that a non-legislative elected official undertakes official acts on behalf of the state, such as issuing veto messages or proclamations, promulgating regulations, making administrative determinations, or issuing judicial opinions, such actions must be conducted in English.[10] Article XXVIII does not purport to regulate such an official's communications on his own behalf, as those are political matters, not government business.

B. Article XXVIII Does Not Violate the Rights of the Public.

At least in part, the Ninth Circuit's decision appears to be based on the insupportable proposition that individuals have a constitutional right to receive government services in a particular language. Such a right would turn the First Amendment on its head: it would become a means for compelling speech by an *unwilling* government speaker. No court has ever required such a

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[9] *See also* Ariz. Rev. Stat. Ann. § 11-402 (1990) (English competency requirement for county officers); Ariz. Rev. Stat. Ann. § 38-201(C) (1996) (same for state, county, city, town, and precinct officers).

[10] *Cf. Barr v. Mateo*, 360 U.S. 564, 573-75 (1959) (recognizing privilege for government officers so long as the publication is made in the performance of their duties); *Long v. Mertz*, 407 P.2d 404, 409 (Ariz. Ct. App. 1965) (adopting *Barr v. Mateo* and extending absolute privilege to statements of public officer "while doing an act in the course of his official duties which he is directed or authorized specifically by law so to do"); Restatement (Second) of Torts § 591 cmt. f (1977) (similar).

result: "Freedom of speech presupposes a willing speaker." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976). To the contrary, other courts considering this issue have firmly rejected constitutional claims that the government must act in languages other than English.[11]

Indeed, such a putative right has no historical basis. From the beginning, the United States has included significant bodies of citizens who spoke second languages, some exclusively; at the time of the Founding, German was the second most widely spoken language in the country.

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[11] *See Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022, 1017 (9th Cir. 1978) ("[T]he Constitution neither requires nor prohibits the bilingual or bicultural education sought by the appellants. Such matters are for the people to decide."); *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973) (government forms and services); *Toure v. United States*, 24 F.3d 444 (2d Cir. 1994) (government notices); *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983) (government forms and services), *cert. denied*, 466 U.S. 929 (1984); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975) (civil service examination for carpenters); *Vialez v. New York City Hous. Auth.*, 783 F. Supp. 109, 120-24 (S.D.N.Y. 1991) ("To accept plaintiff's contention that as a constitutional--rather than legislative--matter, plaintiff has a right to have certain documents written in Spanish would place an insurmountable and unjustified burden on the Housing Authority."); *Commonwealth v. Olivio*, 337 N.E.2d 904, 911 (Mass. 1975) ("This is not an officially multilingual country, and notification of official matters in the sole official language of both this nation and this Commonwealth is patently reasonable"); *Alfonso v. Board of Review*, 444 A.2d 1075, 1077 (N.J.), *appeal dismissed & cert. denied*, 459 U.S. 806 (1982) (decision whether to provide translation and in what language "is one that is best left to those branches of government that can better assess the changing demands of both the non-English-speaking population and the government agencies that provide the translation").

Almost contemporaneously with the passage of the First Amendment, Congress rejected appeals for the government to accommodate non-English speakers by providing government services in foreign languages. On January 13, 1795, the U.S. House of Representatives defeated a bill to print 3,000 sets of the federal laws in German "for the accommodation of such German citizens of the United States, as do not understand the English language." 4 *Annals of the Congress of the United States* 1082, *quoted in* Dennis Baron, *The English-Only Question* 88 (1990). Indeed, the decisive vote against bilingual publication was cast by the first Speaker of the House, Frederick Augustus Muhlenberg, a German-American from Pennsylvania, then the state with the largest German population. *Id.*

Nor was this a singular event. The following month, the House defeated a similar proposal, and passed a bill providing for publication of current and future statutes in English only. With Senate concurrence, President Washington signed the bill into law. *Id.* at 89. "On a number of occasions during the nineteenth century the Congress again rejected motions to print laws or other documents in German as well as English." *Id.* Similarly, in 1810 Congress rejected Michigan's petition to translate the federal laws into French. *Id.* at 90. Congress also rejected proposals to print copies of the President's annual message in German, Low German, or French in every year from 1843 to 1847. *Id.* at 91-92. In 1862, Congress rejected a bill to print copies of a Patent Office report on agriculture in German. *Id.* at 92.

Moreover, recognizing a right of citizens to demand that their government operate in languages other than English would create undue burdens on the operation of government. Over 300 languages are spoken in the United

States, and each speaker would have the same right to have government regulations rendered in his or her own language.[12] There is no principled distinction between recognizing rights in the second most widely spoken language and rights in any other of the many languages spoken in the United States today. *See Vialez v. New York City Housing Auth.*, 783 F. Supp. 109, 123 (S.D.N.Y. 1991).

That an individual government employee such as Maria-Kelley Yniguez may feel confident about her ability to communicate the government's message in another language does not relieve the burden on the public fisc or the interference with the government's efficient operation. Anyone who has tried to translate a legal document instantly confronts the distinction between fluency in the language of every-day life and command of the nuances of legalese or other technical jargon. The government should not have to accept the risk that even its employee's best efforts may not be good enough.

To the extent that there is a public interest in providing services in other languages, such determinations should be left to the political branches of government, and should not be a matter of constitutional fiat. No doubt the federal government or the states have found occasions to publish documents or send communications in languages

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[12] Indeed, federal regulations under the Voting Rights Act of 1965 require printed or oral voting assistance and ballots to be offered in various American jurisdictions in 31 American Indian languages, 2 Alaskan Native languages, and Spanish, French, Chinese, Japanese, Vietnamese, and Filipino. 28 C.F.R. pt. 55 app. (1995). The number of languages required is limited by complex demographic thresholds. 28 C.F.R. § 55.5 (1995).

other than English, *e.g.*, Radio Free Europe and Radio Marti. The executive and legislative branches have always had the prerogative to determine if, when, and where government should use other languages.[13] Until now, courts have not intruded on such decisionmaking authority in the name of constitutional imperatives. This case should not be an exception.

C. The Decision Below Commits Government Language Policy to the Whim of Individual Government Employees.

The Ninth Circuit's decision below does not merely give constitutional status to multilingualism. By recognizing new First Amendment rights of government employees and officials to make their own language choice, the Ninth Circuit has removed language policy from the hands of the voters and their government and placed it in the hands of each individual employee or officeholder.

This is a sword that cuts in both ways. For every government employee who eschews Official English there is one that rejects bilingualism. By recognizing the right of an individual civil servant to speak the language of his or her choice on the job, the Ninth Circuit allows government employees to thwart multilingual policies just as well as monolingual ones. There is simply no principled distinction between allowing a government employee unilaterally to reject government policies underlying

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[13] Thus, in *Lau v. Nichols*, 414 U.S. 563 (1974), the Court required the public school district to provide assistance of some kind to Chinese-speaking students based the Civil Rights Act of 1964 and the administrative regulations promulgated thereunder, *not* on constitutional considerations. *Id.* at 566-69.

Official English while prohibiting them from doing the same to the policies underlying the Voting Rights Act. Insubordination is not a creature easily tamed once loosed: the "force" of the Ninth Circuit's view "will turn government employment into a platform for endless attacks on government policy and governance into a tug of war between those who make the laws and those who enforce them." *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 962 (9th Cir. 1995) (Kozinski, J., dissenting).

This is by no means a farfetched hypothetical situation. Bilingual employees in Arizona have sued a municipal agency on the ground that they should not be compelled to speak Spanish on the job--at least not without being paid more than monolingual employees for their trouble. *Cota v. Tucson Police Dep't*, 783 F. Supp. 458 (D. Ariz. 1992). Bilingual employees with Yniguez's strength of conviction but polar-opposite views may well refuse to speak their second languages in order to affirm their Americanness. In the words of a contemporary Mexican-American writer:

> I entered this country through the language and I am not mistaken about my journey's meaning. I understand why Americans hold tightly to the language. It is because we are afraid of losing our gain. With a convert's certainty, I believe that America can have but one public language. Like other Americans I claim the language as a prize. Though privately we are different from one another in the color and sound of our memory, a shared public language gives breath to our union. . . . I will never regret that American English is what I speak.

Richard Rodriguez, *Unilingual, Not Unilateral*, Wall Street J., June 25, 1985.[14]

Such choices about the operation of government are political decisions that should be made by the government itself or the people, not individual employees. The Ninth Circuit has essentially turned the principles of the Constitution upside down, giving public officials the discretion to decide whether they wish to carry out their duties in the democratically determined manner, their wishes subject only to the approval or disapproval of the courts. The Framers of the Constitution sought to create a form of government in which the will of public officials as to the manner in which they carried out their official duties would ultimately be subordinate to the will of the people as expressed through the democratic process--not the other way around. This Court should reverse the Ninth Circuit's atomization of government language policy and put control over the operation of government back into the hands of the people and the democratic process.

II. Official English Rules Serve Legitimate Interests of the Government as an Employer.

The Ninth Circuit has shown little regard for the strong public policies underlying Official English provisions. Some of the considerations reflect operational concerns that government and private employers share. This Court has recognized that the government, as an employer, may seek to maintain order and discipline in the

[14] *See generally* Francois Grosjean, *Life with Two Languages: An Introduction to Bilingualism* 110-112 (1982) ("[M]any immigrants want their children to assimilate as quickly as possible, and hence either do not reinforce the [native] language or actually forbid its use.").

workplace in the same manner as a private employer. *Waters*, 114 S. Ct. at 1886. Control over the language used by employees advances two principal concerns of employers public and private: (i) the need to communicate clearly and efficiently, and to supervise employees properly; and (ii) the need to ensure workplace tranquility in light of a diverse workforce. Other courts, including the Ninth Circuit, have recognized the legitimate interests behind workplace English-only policies in the private setting.[15] The Ninth Circuit below erred in not doing the same in the public setting.

A. The Employer's Need to Communicate Clearly and Efficiently and Maintain Workplace Discipline.

An employer has a strong interest in maintaining the uniformity and coherence of its message. Without the ability to mandate a specific language for communicating with the public, the employer seeking to maintain the coherence of its message would be compelled to hire translators to adapt its sales literature, customer service scripts, and other message texts into whatever languages an employee saw fit to speak. Even then, translation is an imperfect art, and employers would be placed in jeopardy

[15] *See Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (striking down EEOC rules against English-only workplace policies), *cert. denied*, 114 S. Ct. 2726 (1994); *Jurado v. Eleven-Fifty Corp.*, 813 F. 2d 1406 (9th Cir. 1987) (employer could require radio announcer to use only English); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981) (employer could require use of English by non-English-speaking employee); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980) (employer could require use of English by bilingual employee), *cert. denied*, 449 U.S. 1113 (1981).

of mistranslation or loss of nuance.[16] Thus, in *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988), *reh'g denied*, 861 F.2d 1187 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989), the Los Angeles Municipal Court justified its internal rule requiring use only of English on the ground that supervisors who do not speak the other language "cannot discern whether employees are correctly disseminating information unless English is spoken." 838 F.2d at 1043.

Like a private employer, the government has a recognized interest in choosing language that will "ensure that its message is neither garbled nor distorted." *Rosenberger*, 115 S. Ct. at 2519. Those concerns are heightened because the government's "message" frequently has the force of law. "Words inevitably contain germs of uncertainty," *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973), and promulgating laws, regulations, and decisions in only one language is trouble enough. Translating terms, particularly legal terms, into another language can be extremely difficult, even for parties generally conversant in both tongues for every-day matters. Official English provisions essentially allocate the risk of mistranslation between the state and the non-English-speaking public; here, Arizona has accepted the burden where life and limb

[16] *Cf. Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 451 & n.2 (3d Cir. 1987) (libel action based on newpaper's translation of litterer as "cerdos," Spanish for "pigs"); *United States v. Perez*, 658 F.2d 654, 662-63 (9th Cir. 1981) (bilingual juror dismissed because of angry dispute over court interpreter's translation).

are at stake by allowing certain government acts to be undertaken in other languages.[17]

Recognizing a right of the public to receive government services--or the right of government employees to render such services--in another language would impose extraordinary stresses on government resources. These would include translating government works into foreign languages, hiring or paying for interpreters, and somehow managing to maintain a consistency of meaning in several languages. In rejecting the proposed translation of the federal laws into French, Congress concluded nearly two centuries ago, in words equally true today, that "[g]reat inconvenience and confusion might result from having two separate texts for the same law, susceptible, as they necessarily would be from the imperfection of all languages, of different and perhaps opposite interpretations." 21 *Annals of Congress* 1886, *quoted in* Baron, *supra* p. 12, at 90. While such multilingualism may be necessary in international bodies such as the United Nations, that interpreter-dependent institution is hardly a model for the U.S. Congress, much less Arizona's state government.

The debate over Official English often ignores the fact that most government agencies already conduct their business only in English and require communications to be in English by unstated practice if not formal rule.[18] "Congress conducts its affairs in English, [and] the

[17] Article XXVIII provides for several exceptions to the English-language rule, including matters relating to "public health or safety" and the protection of "criminal defendants or victims of crimes." Ariz. Const. art. XXVIII, § 3(2).

[18] *E.g.*, 37 C.F.R. § 2.31 (1995) (application for trademark registration "must be in the English language").

executive and judicial branches of government do likewise." *Soberal-Perez v. Heckler*, 717 F.2d 36, 42-43 (2d Cir. 1983). "'No Continental American court, federal or state, has ever conducted its proceedings in any language other than English.'" *United States v. Ramos Colon*, 415 F. Supp. 455, 465 (D.P.R. 1976) (three-judge court) (quoting *United States v. Valentine*, 288 F. Supp. 957, 963-64 (D.P.R. 1968)). It is difficult to imagine any federal or state court accepting a brief written only in Tagalog from a Filipino party acting *pro se* who could not speak English; it is similarly inconceivable that the Judicial Conference would permit mischievous federal judges to issue their opinions solely in Romanian.

Indeed, Congress and the federal judiciary have deemed themselves constitutionally empowered to mandate the use of English. Federal law requires that "[a]ll pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language." 48 U.S.C.A. § 864 (1987). That provision has been upheld though the primary language of most American citizens in Puerto Rico is Spanish. *United States v. Valentine*, 288 F. Supp. 957 (D.P.R. 1968). Under the rules of the U.S. Court of Appeals for the First Circuit, on appeal "[t]he court will not receive documents not in the English language unless translations are furnished." 1st Cir. R. 30.7 (1996). This Court also requires translations of "material written in a foreign language." Sup. Ct. R. 31.

Maintaining coherence of the message is just one aspect of the employer's need to maintain adequate supervision and discipline in the workplace. Supevisors must from time to time give instructions to their subordi-

nates on how to perform their jobs, or on what steps to take to respond to workplace emergencies. Indeed, it is an increasingly common experience that an employer will monitor employees' communications with the public to check on the quality of the employees' customer service. This may be impossible where, as in respondent Yniguez's circumstances, the supervisor does not speak the second language used by the employee. *See Gutierrez*, 861 F.2d at 1187, 1188 (Kozinski, J., dissenting from denial of reh'g en banc) (English-only rule was "intended to assist 'supervisors to understand the work conversations of their subordinates'").

Coping with the need to supervise employees who speak in different languages on the job poses its own problems. "[G]iving employees the nearly absolute right to speak a language other than English . . . will . . . force employers to establish separate supervisorial tracks for employees who choose to speak another language during working hours." *Id.* The resulting balkanization of the work force interferes with the employer's efficient operating by impairing its ability to freely reassign employees in response to business needs.

Arizona's Official English provision recognizes that the government can do its job most coherently and efficiently when all of its personnel are working in the same language. That recognition is entitled to respect, not the short shrift given by the court below. "The government interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it is a sovereign to a significant one when it is an employer." *Waters*, 114 S. Ct. at 1888.

B. The Employer's Need to Maintain Workplace Harmony

The very diversity of the American work force may require adoption of English-only policies. Allowing groups in the workplace to use different languages not understood by coworkers may breed suspicion and animosity over whether the other languages are used to encrypt ridicule or even sexual harassment. The employer may institute an English-only rule seeking only to allay fears and distrust. Indeed, in *Gutierrez*, the "English only rule was not adopted by the Municipal Court judges out of xenophobia, but in response to a 'complaint from a black female employee concerning the use of the Spanish language between employees in order to conceal the substance of conversation during working hours on the work floor.'" *Gutierrez*, 861 F.2d at 1187, 1188 (Kozinski, J., dissenting) (quoting declaration of Municipal Court Chief Clerk). This is hardly a unique occurrence. *See Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (similar), *cert. denied*, 114 S. Ct. 2726 (1994); *McNeil v. Aquitos*, 831 F. Supp. 1079 (S.D.N.Y. 1993) (black nurse felt isolated, harassed, and impaired in doing her job effectively, thus endangering infant's life, because other nurses spoke Tagalog on duty).

By comparison to policies adopted by other employers, Article XXVIII takes a measured approach: it does not attempt to limit casual workplace conversations in other languages, but merely regulates the manner in which official acts and functions of the state are conducted. Both public and private employers should be free, however, to promulgate language-related rules as they are dictated by the operational needs of their workplaces.

III. Official English Rules Are Justified by the Public Interest.

A. A Common Language of Political and Legal Discourse Benefits the Public.

The State of Arizona, like the federal government and other state governments, has sovereign interests in preserving English as the common, official language of government quite apart from its interests as an employer. These include preserving social and political cohesion and avoiding linguistic fragmentation. As the Court has noted, "shared language can serve to foster community." *Hernandez v. United States*, 500 U.S. 352, 371 (1991).

Healthy political life becomes impossible in the absence of a common tongue. Politics requires deliberation, and deliberation requires that those deliberating understand each other; such understanding is difficult, if not impossible, where the deliberators do not speak the same language.[19] This is even more true in a democracy, where the people are sovereign, and government is not the preserve of a favored few, but the purview and the responsibility of the people as a whole. To fulfill that responsibility, the people as a whole must be able to deliberate amongst themselves, and to deliberate, they must be able to communicate. This is impossible in the absence of a common tongue.

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[19] It is telling that in ancient Greek, the language in which political science was born, the word for "speech" and "reason" is the same: *logos*. There can be no reasoning without speech, without language, without a medium in which to develop that reasoning. Similarly, there can be no communication of the fruits of reasoning without a common language.

The very special case of the United States makes a common language even more imperative. More than 150 years ago, Alexis de Tocqueville noted that one "circumstance which makes it easy to maintain a Federal government in America" is "a common language." 1 *Democracy in America* 175-76 (Bradley ed. 1945). Tocqueville observed that "[a] certain uniformity of civilization is not less necessary to the durability of a confederation than a uniformity of interests in the states that compose it." *Id.* America's commonality of civilization, undergirded by its commonality of language, left "Maine and Georgia, separated by a distance of a thousand miles, more naturally united than Normandy and Brittany," which "are separated only by a brook." *Id.* at 171, 176. Even today, "a common language is a necessary bond of national cohesion in so heterogenous a nation as America." Arthur M. Schlesinger, Jr., *The Disuniting of America* 110 (1992).

America's need for a common language is unique not only because of its geographic expanse. Unlike every other nation in the history of the world, ours is a nation formed not on the basis of ancestry, common borders, or "culture," but rather on the basis of principles. Those principles are derived from reason itself and are therefore accessible to all men in all times. But they were articulated in a particular language--an accident perhaps, but an ineluctable reality. The cornerstones of the American political and legal experience have been in English: the Mayflower Compact, the Declaration of Independence, the Federalist Papers, the Constitution, the Northwest Ordinance, the Gettysburg Address, and, not the least, two centuries of this Court's own jurisprudence.

Those documents contain many of the maxims that express the core of the American idea, and that the

Founders intended to become part of the language, part of the mental make-up of every citizen. These philosophical, political, and legal concepts, expressed in often poetic terms in the English language, have become embedded in the American civic mind and attained talismanic significance: *all men are created equal*; *Life, Liberty, and the Pursuit of Happiness*; *if men were angels, there would be no need for government*; *in order to form a more perfect Union*; *due process of law*; *equal protection of the laws*; *government of the people, by the people, for the people*. Such maxims and principles are the tie, or as Lincoln put it, the "electric cord" that binds us together: they make us, the children of immigrants, the "blood of the blood, and flesh of the flesh" of the Founders who came before us.[20]

In carrying forward these principles, the English language is historically intertwined with a political tradition reaching far outside the United States both spatially and temporally. Thus, Sir Winston Churchill recognized that the American "Constitution was a reaffirmation of faith in the principles painfully evolved over the centuries by the English-speaking peoples." 3 Winston S. Churchill, *A History of the English-Speaking Peoples* 256 (1957). The vitality and importance of America's linguistic connection with other English-speaking peoples is demonstrated by our continuing reliance on the common law shared by those peoples and inherited by the United States.[21]

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[20] Abraham Lincoln, *Abraham Lincoln: Speeches and Writings 1832-1858*, at 456 (1989).

[21] American law students still learn contract law by studying *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1856). This Term, the Court sought guidance from English case law from the time

(continued...)

For the principles to have effect, for this nation to work, we must all be able to discuss our political heritage, the foundations of our rights, the nature of our duties, together. And to do this, we must share a common language. Understanding and digesting those maxims and the principles that inform them as the Founders of our nation did requires that we read and understand their words as they spoke and wrote them, and this requires that we--all of us--understand English.

Perpetuating such principles through a multitude of languages is a problematic enterprise. Many of the maxims that we cherish suffer in translation: nuance of meaning is lost, along with the poetic resonance that testifies to their philosophical depth and grandeur. "[L]anguage colors the depths of our consciousness. It is the medium that dominates perceptions, organizes categories of thought, shapes ideas and incorporates a philosophy of existence." Arthur M. Schlesinger, Jr., *The Cycles of American History* 433 (1986). "The language-field of the Founding Fathers directed the American consciousness toward one constellation of standards and purposes," *id.*, and the English language is the particular lens through which Americans view that universal constellation of principles. *See Guadalupe Org.*, 587 F.2d at 1027. To help preserve the distinctly American vision of universal principles, the people have the right to insist that the government use the language of the American political tradition.

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[21](...continued)
of the adoption of the Seventh Amendment through the 1850s in deciding whether patent construction was an issue for the court or for the jury. *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 1390-92 (1996).

B. Official English Policies Benefit Non-English Speakers by Encouraging English Proficiency.

While the United States may have yet preserved its common language without express declarations that English is the official language, the nation faces new challenges to the durability of its common ground. "A cult of ethnicity has arisen both among non-Anglo whites and among nonwhite minorities to denounce the idea of a melting pot, to challenge the concept of 'one people,' and to protect, promote, and perpetuate separate ethnic and racial communities." Schlesinger, *The Disuniting of America*, *supra* p. 24, at 15. This "reverses the historic theory of America as one people--the theory that has thus far managed to keep American society whole. . . . The multiethnic dogma abandons historic purposes, replacing assimilation by fragmentation, integration by separatism. It belittles *unum* and glorifies *pluribus*." *Id.* at 15-16.

One perceived area of threat to American unity is in the area of language. "The historic idea of a unifying American identity is now in peril in many arenas," including "our language." *Id.* at 17. As a recent Congressional report noted,

> [i]f language and cultural separatism rise above a certain level, the unity and political stability of the nation will--in time--be seriously diminished. Pluralism within a united American nation has been the single greatest strength of this country. This unity comes from a common language and a core public culture of certain shared values,

> beliefs, and customs which make us distinctly "Americans."

S. Rep. No. 132, 99th Cong., 1st Sess. 7 (1985).

In this sense, the United States now must address concerns that other countries have long faced. Many of them have experienced language-driven political instability with only two linguistic groups, including Canada (English and French) and Belgium (Flemish and French). *See Gutierrez*, 861 F.2d at 1192-93 (Kozinski, J., dissenting). With hundreds of languages being spoken, the United States may face even greater risks. The very heterogeneity of the American population "makes the quest for unifying ideas and a common culture all the more urgent." Schlesinger, *The Disuniting of America*, *supra* p. 24, at 19.

Linguistic fragmentation also tends to exacerbate other societal divisions. *See Guadalupe Org.*, 587 F.2d at 1027; *Gutierrez*, 861 F.2d at 1192-93 (Kozinski, J., dissenting). Populaces divided by language tend to fracture socioeconomically along the same lines, with elite groups speaking one language and disadvantaged classes speaking another. Such concurrent cleavages increase stratification of society and decrease social mobility, as lower classes find themselves impaired in moving ahead by their lack of English language skills.

To the extent that Official English provisions encourage all citizens and aliens to learn English in order to deal with the government, such provisions have an inclusive rather than exclusive effect. They indirectly ease the integration of non-English speakers into schools, the job market, the economy, and society. Whatever obstacles immigrants may face in the short run are more than

justified in the long run by the democratizing and unifying effects of a common language. In this respect, Official English provisions merely continue longstanding American public policy. Federal law has long required, with limited exceptions, proof of an understanding of the English language as a prerequisite for naturalization. *See* 8 U.S.C.A. § 1423(a) (Supp. 1996). Even illegal aliens seeking only permanent residence must learn or at least study English. 8 U.S.C.A. § 1255a(b)(1)(D) (Supp. 1996).

The arguments against Official English proposals are essentially variations on the argument for bilingual education: providing government services in other languages will allow those not proficient in English to move ahead while they gain such proficiency. But that policy choice is not of constitutional dimension, and likely is not even correct. While the evidence is mixed, "indications are that bilingual education retards rather than expedites the movement of Hispanic children into the English-speaking world and that it promotes segregation more than it does integration." Schlesinger, *Disuniting of America*, *supra* p. 24, at 108; *see generally* Rosalie Pedalino Porter, *Forked Tongue: The Politics of Bilingual Education* 59-84 (1990). As one Mexican-American writer has noted, "[t]hose who have the most to lose in a bilingual America are the foreign-speaking poor, who are being lured into a linguistic nursery, quite apart from power and money in English-speaking America." Richard Rodriguez, *supra* p. 16.

Moreover, English proficiency will only grow in importance as the world shrinks. "English is the undisputed lingua franca of the business world." *The Economist*, May 16, 1987, at 71. German and Chinese business partners communicate in English; Swedish multinational corpora-

tions and investment houses produce internal memos and conduct board meetings in English; Japanese employees abroad speak to each other in English. *Id.* The Ninth Circuit's decision rejects English as a necessary common language at the same time that the rest of the world is embracing it as such. Those lured into complacency by the court's decision will end up even worse off.

Arizona has chosen to encourage proficiency in the English language by operating its government only in the English language. "National unity as an end which officials may foster by persuasion and example is not in question." *Texas v. Johnson*, 491 U.S. 397, 418 (1989). The people of Arizona have not acted with a hardened heart, however. Article XXVIII expressly permits the use of other languages where necessary for "public health or safety," to protect the rights of both "criminal defendants" and "victims of crimes," and to provide transitional bilingual education. Ariz. Const. art. XXVIII, § 3(2). While some may quibble with the ultimate effectiveness or fairness of a policy that accepts short-term inconveniences as the price of long-term benefits, such matters are properly assigned to the political branches and the voters. This Court should uphold Article XXVIII and return control over government language policy to where it belongs.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below of the United States Court of Appeals for the Ninth Circuit.

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